APPENDIX A

DIVERSIFIED FOODS, INC., et al.,
Plaintiffs-Appellants,

v.

The FIRST NATIONAL BANK OF BOSTON, et al.,
Defendants-Appellees.

No. 92-1164.

United States Court of Appeals,
First Circuit.

Heard July 29, 1992.

Decided Feb. 8, 1993.

Before TORRUELLA and BOUDIN, Circuit Judges, and KEETON, District Judge (District of Massachusetts, by designation)

BOUDIN, Circuit Judge.

In this case the district court dismissed a suit brought under the Bank Holding Company Act, 12 U.S.C. § 1972, on the ground that it was barred by *res judicata*. The prior litigation, held to bar the new federal action, was a state-court suit brought by the same plaintiffs against the same defendants and decided in favor of the latter. The disappointed plaintiffs now appeal, urging on several grounds that *res judicata* does not properly apply. In full agreement with the district court, we affirm its decision.

The procedural history of the two cases is complex and intertwined but a brief summary will suffice at the outset. Diversified Foods, Inc., and its operating subsidiary New England

Sales, Inc. (collectively, "the borrowers"), were engaged in a specialized form of wholesale distribution of goods. In financing their activities, they entered into various borrowing arrangements with First National Bank of Boston and its Maine subsidiary Casco Northern Bank (collectively, "the banks"). The arrangements, at least in the borrowers' view, contained terms restricting their ability to obtain alternative sources of financing.

During 1988, the borrowers first sought to expand their business and then suffered large losses. They attribute this reversal of fortune to the failure of the banks to provide adequate credit under the borrowing arrangements. Claiming multimillion dollar damages, the borrowers on August 21, 1989, brought suit against the banks in Maine Superior Court, asserting various state-law tort and contract claims. The complaint, as later amended in 1990, included the charge that the banks violated an implied covenant of good faith by imposing "unreasonable restrictions so as to prevent the [borrowers] from obtaining alternative financing." Discovery in the state case proceeded during 1989 and 1990.

On September 14, 1990, while the state case was proceeding, the borrowers brought the present action against the banks based on the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972(1). The new federal claims were based, it appears, on information obtained through discovery in the state case. The borrowers say that the new claims were asserted in a separate action in a different court because at that time the borrowers held the view (contrary to two circuit decisions) that federal courts have exclusive jurisdiction over claims under section 1972.[1]

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[1]Two weeks before filing the federal complaint, the borrowers moved to amend their state complaint to charge that the banks had breached their duty of good faith by "unreasonable, illegal, and anticompetitive" restrictions on alternative financing. Shortly after the federal complaint was filed, the banks opposed the state amendment. When the borrowers responded that the federal claims

When the banks answered the federal complaint on October 24, 1990, they included as a defense the assertion that the borrowers "have improperly split their causes of action, having previously filed in another court another complaint arising out of the same transaction or series of transactions." Thereafter, the banks resisted the borrowers' efforts in January 1991 to introduce the state claims into the federal action by amendment of the federal complaint or to delay the state proceedings. The banks did agree to have discovery in either case treated as if taken in both.

On April 18, 1991, the Maine Superior Court granted summary judgment in favor of the banks, a decision later affirmed on appeal. *Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609 (Me. 1992). The banks then moved for summary judgment in the federal action on grounds of *res judicata*, and the district court granted the motion on January 9, 1992. 785 F. Supp. 8. A belated attempt by the borrowers to reopen the state case to add the federal claims was rejected by the state court, and this action was also affirmed on appeal. *Id.* The borrowers then pursued this appeal in the federal case.

[1] In this court the borrowers first argue that federal courts have exclusive jurisdiction over claims under the Bank Holding Company Act's anti-tying provisions. Therefore, they argue, *res judicata* cannot properly derive from the state court judgment because they could not have included the federal claims in their state case. We need not decide whether the conclusion would follow if the premise were sound, for the premise is mistaken. We follow two circuits and several other courts that uniformly hold that state tribunals have concurrent jurisdiction over section 1972 claims. *Cuervo Resources, Inc. v Claydesta Nat'l Bank*, 876 F.2d 436 (5th

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were not being asserted in the state case, the state court allowed the amendment, striking the words "illegal" and "anticompetitive."

Cir. 1989); *Lane v. Central Bank, N.A.*, 756 F.2d 814 (11th Cir. 1985).[2]

[2] The Bank Holding Company Act provides that anyone injured by a violation of section 1972 may sue "in any district court of the United States," admittedly making no reference to state courts. 12 U.S.C. § 1975. But it is now settled that there is a presumption in favor of concurrent jurisdiction, so that state courts may entertain federal civil claims as a matter of course "absent provision by Congress to the contrary or disabling incompatibility" between the federal claim and state court jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, 101 S.Ct. 2870, 2874-75, 69 L.Ed.2d 784 (1981). Here there is no explicit bar to state-court jurisdiction and the subject matter is hardly beyond the competence of the state courts, which routinely consider claims under their own antitrust laws.

Of course, the resemblance to antitrust law cuts both ways, providing the borrowers' best argument for exclusive federal jurisdiction. Section 1972 is a blunter version of section 3 of the Clayton Act, 15 U.S.C. § 14, and with qualifications courts use Clayton Act precedents in applying section 1972. *E.g., Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 58-59 (5th Cir. 1978). In empowering federal courts to hear Clayton Act cases, Congress made no reference to state-court jurisdiction, *see* 15 U.S.C. § 15, and it is well settled (by judicial construction) that federal antitrust claims may be asserted only in federal court. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436, 440, 40 S.Ct. 385, 386, 64 L.Ed 649 (1920). The borrowers urge that the same gloss be applied to the Bank Holding Company Act.

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[2]Several state courts have reached the same conclusion. *See United Central Bank, N.A. v. Kruse*, 439 N.W.2d 849 (Iowa 1989); *Waite v. Banctexas-Houston, N.A.*, 792 S.W.2d 538 (Tex. Ct. App. 1990).

Exclusive federal-court jurisdiction over antitrust claims, although a firmly rooted rule, is the product of reasoning that the Supreme Court no longer applies in new matters. Like baseball's judicial "exemption" from the antitrust laws, *see Flood v. Kuhn*, 407 U.S. 258, 283-84, 92 S.Ct. 2099, 2112-13, 32 L.Ed.2d 728 (1972), the result persists but is not extended. This is the clear message of *Tafflin v. Levitt*, 493 U.S. 455, 459-60, 110 S.Ct. 792, 795-96, 107 L.Ed.2d 887 (1990), where the Supreme Court affirmed the state courts' concurrent jurisdiction over civil RICO claims and rejected the same Clayton Act analogy offered here. Indeed, the RICO statute uses jurisdictional language quite similar to the Bank Holding Company Act, *compare* 18 U.S.C. § 1964(c) *with* 12 U.S.C. § 1975, and was passed by the same Congress in the same session. *Tafflin* offers the *coup de grace* to the borrowers' argument for exclusive jurisdiction.[3]

[4] In *Currier v. Cyr*, 570 A.2d 1205 (Me. 1990), the Maine Supreme Judicial Court summarized the rule it follows in deciding whether new claims are barred because they were or "might have been" litigated in the prior case:

> Maine has accepted what is known as a "transactional test" of cause of action, which defines "the measure of a cause of action as the aggregate of connected operative facts that can be handled together conveniently for purposes of trial."

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[3]We give little weight to occasional references by Congress, in the legislative history of section 1972, to suits in "federal" courts. *See, e.g.*, 2 *One-Bank Holding Company Legislation of 1970: Hearings Before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 966 (1970) (statement of Sen. Bennett) (referring to "the process of suit through the Federal courts. . ."). These references, if any intent is attributable to them, appear to reflect the natural assumption that Bank Holding Company Act claims would usually be litigated in federal forums.

Id. at 1208 (quoting *Gurski v. Culpovich*, 540 A.2d 764, 766 (Me. 1988)). Accordingly, so long as the parties are the same in both cases and a final judgment was entered in the prior action, "a subsequent suit that arises out of *the same operative facts* shall be barred even though the second suit relies upon a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves [different] evidence. ..." *Id.* (emphasis added).

[5] In the present case the borrowers' federal claims under section 1972 unquestionably arise out of "the same operative facts" as the state claims earlier asserted by the borrowers. They themselves, in an unsuccessful attempt to add the state claims to the federal case based on pendent jurisdiction, told the district court that "[t]he facts forming the basis for the state claims are the same facts which form the basis of the pending [federal] action. ..." A comparison of the two complaints shows that the factual allegations substantially overlap. Further, the central tying allegation in the federal complaint -- that the banks restricted the borrowers' access to alternative sources of credit -- was one of the express claims in the state action.

[6] In this court, the borrowers make only a half-hearted effort to distinguish the two complaints under the Maine transactions tests for *res judicata*, and we think the point needs no further discussion. The borrowers' central arguments in resisting *res judicata*, exclusive jurisdiction aside, are variants on a single theme. They argue in substance that the banks themselves strove to keep the two actions separate, resisted the assertion of state claims in the federal case and vice versa, and now use the judgment in the suit first decided to prevent litigation of the other on the merits. This effort to resist consolidation, say the borrowers, should estop the banks from invoking *res judicata* or should be treated as a waiver of the defense.

We accept *arguendo* the borrowers' version of events, although it is unclear whether the banks followed a conscious

strategy or merely opposed seriatim the successive demands of an opponent. But in either event we do not see how the gravamen of the charge -- the banks' resistance to consolidation of the federal and state claims -- gives rise to an estoppel of the banks. The banks are not alleged to have said anything untrue. Their position throughout has been consistent. There is not even a valid charge of concealment or surprise: the banks' answer in the federal case gave fair warning of the risk of *res judicata* by asserting a claim splitting defense, expressly referring to the borrowers' state suit "arising out of the same transaction or series of transactions."

[7] As for waiver, it may be assumed that Maine, consistent with general law on the subject, would disallow *res judicata* if the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." *Calderon Rosado v. General Electric Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986) (quoting *Restatement (Second) of Judgments* § 26(1)(a)).[4] Indeed, in *Thompson v. Gaudette*, 148 Me. 288, 92 A.2d 342 (1952), the Maine Supreme Judicial Court said that the rule against splitting a cause of action will be waived unless the defendant asserts it "at the earliest opportunity." 92 A.2d at 348 (quoting *Mayfield v. Kovac*, 41 Ohio App. 310, 181 N.E. 28, 30 (1931)). In our case, the banks at the outset pleaded claim-splitting in their answer and maintained that position throughout the case.

Courts could, we suppose, disallow the claim preclusion defense wherever two suits are brought and the defendant thereafter resists their consolidation. But when a plaintiff has chosen to bring two lawsuits in the same time frame relating to the same operative

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[4]In *Calderon Rosado* this court rejected on waiver grounds a *res judicata* defense in a federal action. The defendant had earlier agreed to the plaintiff's voluntary dismissal "with prejudice" of a wrongful discharge claim under Puerto Rican law brought in a local court, "seemingly acceding to plaintiff's desire to litigate in federal court" under a federal statute. 805 F.2d at 1086.

facts, it is hard to see why the defendant should not be able to resist consolidation on proper grounds, such as undue delay. If the resistance is unjustified, the plaintiff may normally litigate that issue within the lawsuit. In fact, the borrowers here did seek to add the federal claims to the state action; but they did so only *after* summary judgment was granted on the state claims. Not surprisingly, the Maine Supreme Judicial Court said that this effort came too late. *Diversified Foods, Inc.*, 605 A.2d at 616.[5]

[8,9] Finally, the borrowers suggest that, estoppel and waiver issues to one side, it would be inequitable to permit the *res judicata* defense. They argue that their decision to bring a separate federal suit, instead of adding the federal claims to the state case, was based on a good faith belief that exclusive federal-court jurisdiction prevented that course. *Res judicata* is a judge-made doctrine resting on considerations of policy, and doubtless there is room for equitable adjustments. *See generally* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4415 (1981). But in this case the mistaken belief in exclusive federal jurisdiction was formed in the face of two circuit decisions to the contrary.

Thus, the case for an equitable departure from *res judicata* is very weak. True, the banks played an aggressive hand, but litigation is inherently aggressive. Further, the borrowers created their own dilemma by bringing the two actions separately, ignoring the concurrent-jurisdiction precedents directly in point. Then, in the teeth of the warning furnished by the banks' claim splitting defense, the borrowers failed to assert the federal claims in the state case

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[5]The borrowers were only slightly more diligent in seeking to add the state claims to the federal case. In late January 1991, they moved to amend the federal complaint to assert the state claims and to stay the state action. This occurred, however, after the close of state discovery and on the eve of the banks' deadline for filing summary judgment motions.

until after that case had been lost. Like the Maine Supreme Judicial Court, we see no equitable basis for resurrecting claims that the borrowers themselves allowed to expire.

Affirmed.

APPENDIX B

DIVERSIFIED FOODS, INC., et al.,
Plaintiffs,

v.

THE FIRST NATIONAL BANK OF BOSTON, et al.,
Defendants.

Civ. No. 90-0221-P-H.

United States District Court,
District of Maine.

January 9, 1992.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

HORNBY, District Judge.

On August 21, 1989, Diversified Foods, Inc. and other plaintiffs ("DFI") filed a ten-count complaint in a state court (Cumberland County Superior Court), asserting against the First National Bank of Boston and other defendants ("FNB") state law breach of contract and tort claims in connection with two loan agreements dated October 21, 1987 ("Agreements"). Two days later FNB filed a state court action against DFI seeking to collect on the Agreements. The state court consolidated the two suits on December 15, 1989. On September 14, 1990, while the state action was pending, DFI filed a separate suit in this Court alleging that FNB's conduct in connection with the Agreements violated certain anti-tying provisions of the Bank Holding Act ("BHCA"), 12 U.S.C.

§ 1972. DFI never raised the BHCA claims in the state court case. FNB responded to the federal complaint by raising improper claim splitting as an affirmative defense. On April 18, 1991, the state court granted summary judgment in favor of FNB on all claims and counterclaims pending in the state court.

FNB has now moved for summary judgment here, arguing that the state court's judgment bars DFI's claims pending in this Court. Because I find, as a matter of law, that DFI is precluded under the doctrine of res judicata from raising the BHCA claims in this Court, FNB's motion is GRANTED.

[1,2] Both parties acknowledge this Court's obligation to give the state court judgment preclusive effect pursuant to 28 U.S.C. § 1738 and, in doing so, I follow the rules of preclusion determined under Maine law. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82, 102 S.Ct. 1883, 1897-98, 72 L.Ed.2d 262 (1982). In Maine, the doctrine of res judicata bars the relitigation of a cause of action that has already been resolved by a valid prior judgment. *Kradoska v. Kipp*, 397 A.2d 562, 565 (Me. 1979); *Barter v. Boothbay/Boothbay Harbor Community School Dist.*, 564 A.2d 766, 768 (Me. 1989). The bar extends to all issues "tried or that might have been tried" in the prior action. *Bray v. Spencer*, 146 Me. 416, 82 A.2d 794, 795 (1951), so long as three requirements are satisfied: (1) the same parties are involved; (2) a valid final judgment has been rendered in the prior action; and (3) the matters presented for decision in the second action were or might have been litigated in the prior action. *Kradoska v. Kipp*, 397 A.2d at 565.

The first two requirements are clearly satisfied here. All parties in this lawsuit were also parties in the state court proceedings.[1] Although DFI has appealed the state court judgment,

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[1]However, Ronald C. Giguere, President, Director and principal stockholder of Diversified Foods, Inc. was a plaintiff in the state

there can be no question that it is a valid final judgment for purposes of res judicata despite the pendency of appeal. *See Bartlett v. Pullen,* 586 A.2d 1263, 1265 (Me. 1991); *Restatement (Second) of Judgments* § 13, comment (f) (1982). The difficulty, if any, lies with the third requirement: specifically, whether the BHCA claims might have been tried in the state court action. DFI insists that jurisdiction under the BHCA is exclusively federal and, therefore, that it could not bring its BHCA claims in state court.

[3] It is well-settled that state courts presumptively enjoy concurrent jurisdiction with federal courts over federal claims unless Congress has divested the states of jurisdiction through "explicit statutory directive" or by "unmistakable implication from legislative history," or because there exists a "clear incompatibility between state-court jurisdiction and federal interests." *See Gulf Offshore Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 887 (1990). DFI does not suggest that there is any "explicit statutory directive"[2] mandating exclusive federal jurisdiction or that any "clear incompatibility" of federal and state interests exists. DFI argues only that the BHCA's legislative history provides proof that jurisdiction under the Act is exclusively federal. According to DFI, Congress intended BHCA to complement the Clayton Act and Sherman Act antitrust legislation. Jurisdiction under these Acts has been held to be exclusively federal. *See Tafflin*

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court proceedings but is not a party in this suit. Further, five corporations affiliated with DFI were defendants in FNB's state court collection claims but are not parties to this action.

[2]The provision granting jurisdiction under the BHCA is 12 U.S.C. § 1975. It states: "Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States. ..." Use of the permissive term "may" here is consistent with the presumption of concurrent state court jurisdiction. *See, e.g., Tafflin v. Levitt,* 493 U.S. at 460-61, 110 S.Ct. at 795-96.

v. Levitt, 493 U.S. at 462, 110 S.Ct. at 797 (*citing General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 286-88, 43 S.Ct 106, 116-17, 67 L.Ed. 244 (1922)). DFI maintains that because Congress was aware of these judicial interpretations and because Congress incorporated a jurisdictional grant in the BHCA virtually identical to that in the Clayton Act,[3] Congress implicitly granted federal courts exclusive jurisdiction over BHCA claims.

[4] The inquiry, however, is whether the legislative record *positively* shows a congressional intent to divest state courts of concurrent jurisdiction. In rejecting a similar argument that jurisdiction under RICO legislation is exclusively federal, the Supreme Court said:

> To rebut the presumption of concurrent jurisdiction, the question is not whether any intent may be divined from legislative silence ..., but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. ... [W]here the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action.

Tafflin v. Levitt, 493 U.S. 455, 462-63, 110 S.Ct. 792, 797, 107 L.Ed.2d 887 (1990). The legislative history here is utterly silent on the question of jurisdiction. Even if Congress considered the BHCA to be "antitrust" law, that fact by no means provides an "unmistakable implication" that Congress intended to confine jurisdiction to the federal courts. I therefore conclude that

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[3]The jurisdictional grant under the Clayton Act, 15 U.S.C. § 15, provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. ..."

jurisdiction under the BHCA is concurrent and that DFI had the opportunity to bring the BHCA claims before the state court. *Accord, Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814, 817-18 (11th Cir. 1985) ("our review of the legislative history [of the BHCA] reveals no 'unmistakable implication' that Congress intended to confine jurisdiction to the federal courts."); *Cuervo Resources, Inc. v. Claydesta Nat'l Bank*, 876 F.2d 436 (5th Cir. 1989).

I further conclude that the state and federal suits involve the same cause of action. Both the BHCA claims and the state breach of contract and tort claims arise out of the same transaction and involve the same operative facts: namely, the Agreements and the parties' conduct surrounding the making and implementing of the Agreements.[4] The cause of action being the same, it was incumbent on DFI, under principles of res judicata, to raise its

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[4]DFI essentially concedes this point in its January 31, 1991 Motion to Amend the Complaint to add the state claims. In support of this motion DFI said: "The facts forming the basis for the state claims are the same facts which form the basis of the pending action relating to the Banks' having violated the [BHCA]." Plaintiffs' Memorandum of Law Supporting Motion to Amend at 2.

BHCA claims in the state court proceedings.[5] *See Kradoska v. Kipp*, 397 A.2d at 568.

Accordingly, FNB's motion for summary judgment is *GRANTED*.

SO ORDERED.

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[5]DFI's assertions to the contrary, I find nothing in the record demonstrating that FNB tacitly acquiesced to having the BHCA claims litigated in this forum. FNB objected to DFI's proposed amendment to the state court complaint which referred to "illegal" and "anti-competitive" conduct on the grounds that such an amendment was untimely and unduly burdensome, not because it agreed that those issues were properly before the federal court. FNB specifically put DFI on notice that it would object by raising claim splitting as an affirmative defense to the BHCA claims. Despite this fact, DFI did not attempt to interject the BHCA claims into the state case until after the state court had granted summary judgment in favor of FNB.

APPENDIX C

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
CV-89-1073
CV-89-1082

DIVERSIFIED FOODS et al.,

Plaintiffs,

v.

THE FIRST NATIONAL BANK
OF BOSTON and CASCO
NORTHERN BANK, N.A.,

Defendants.

MOTION HEARING

BEFORE: HONORABLE KERMIT V. LIPEZ,
JUSTICE OF THE SUPERIOR COURT

Cumberland County Courthouse
Portland, Maine

September 28, 1990
1:30 p.m.

[22] THE COURT: All right, my position is as follows, I am going to grant the motion to amend, I will delete only the words illegal and anticompetitive. I do that with the clear understanding by

the representations made by Mr. Poulos that any allegations of illegality under the federal act are no part of this trial.

I do recognize that the presence of the **[23]** words unreasonable may raise questions about the commercial reasonableness of this type of provision which may require expert testimony, there are still two months left in the discovery period, I recognize that the need for such expert testimony if there is a need will increase the costs, perhaps for both parties in this case, but I do not believe that the extra cost constitutes undue prejudice. I do not feel that there has been any bad faith in the filing of this amendment, the timing was consistent with the deadlines set forth in the pretrial order.

Mr. Poulos has indicated, and I have no reason to question this, that over the history of the case as it has evolved so far they began to focus on these provisions and not only they're unreasonable but also they're possible illegality, the illegality has become part of the federal action. I see again no bad faith or desire for a delay, in fact to the contrary, the plaintiffs have been eager to get this matter to trial. In short, I don't see that I can make the findings that would be necessary to preclude this amendment as amended and therefore I will **[24]** grant the motion to amend.

I also will say right now that I see no reason given this amendment and the time that is still available for discovery to delay the trial, I see no reason therefore to depart from the January trial that we were talking about, I will do all that I can to try to get the matter tried here in Cumberland County, however, for all the reasons we have discussed previously I simply don't know if it's possible, I will try as best I can to have that done, but if I can't it will have to be done in Sagadahoc County.